In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1510

LOUIS B. PACHECO AND JOHN N. FOUNTAIN, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of operating an illegal gambling business involving five or more persons, in violation of 18 U.S.C. 1955 and 2, and conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Pacheco was sentenced to three years' imprisonment on each count, the sentences to run concurrently; execution of the sentence was suspended, and he was placed on three years' probation. Petitioner Fountain was sentenced to three years' imprisonment on each count, the sentences to run concurrently; execution of all but 150 days of his sentence was suspended, and he was placed on five years' probation. The court of appeals affirmed (Pet. App. A14-A38).

Petitioners were indicted along with 58 others in connection with an illegal gambling organization involving bookmaking and numbers operations in Florida.[1] Pacheco was one of the bookmakers involved in the business; he also accepted layoff bets from other bookmakers in the operation. Fountain was a financial backer of the operation, providing short term credit necessary to pay off bettors in bad weeks.

1. Petitioners contend (Pet. 14-24) that the district court should have suppressed evidence derived from wire interceptions conducted by the Florida Department of Law Enforcement (FDLE) pursuant to authorization by a justice of the Florida Supreme Court. They claim that the United States improperly withheld from the FDLE, and therefore from the Florida judge, information concerning the cooperation of an informant.[2] They argue that this information was required by 18 U.S.C. 2518(1) (c), which provides that an application for an order authorizing an interception must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed * * *."

The contention was properly rejected in the opinions of the district court (Pet. App. A9-A12) and the court of appeals (Pet. App. A34-A35), upon which we rely. The court

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[1]Fifty-two of the defendants pleaded guilty, one other was convicted on both counts, one was convicted only of the substantive count, one died, one had his case dismissed, and two had their cases severed for later trial.

[2]The investigation was handled originally by the Florida authorities. Later the United States agreed to prosecute the case (Pet. App. A28).

of appeals correctly concluded that "Mrs. Matthews' identity and information were known only to the United States, which was unaware of the Fox tap application until after it had been made and approved"; that Mrs. Matthews' life was, in any event, in such danger that the FBI would not have been required to disclose to the FDLE her name and the information she was giving; and that even if the FBI had known of the intercept application and even if Mrs. Matthews' life had not been in danger, disclosure would not have provided sufficient grounds to foreclose the authorization of an interception, because "there was no reason to suppose that Mrs. Matthews' information was sufficient for purposes of complete investigation of this case" (Pet. App. A35).

2. Petitioners contend (Pet. 25-29) that the district court should have stricken the testimony of a government witness, because the government failed to preserve two tape-recorded interviews of the witness and was therefore able to supply under the Jencks Act only written summaries made by the FBI agent who had interviewed the witness.

In July 1971, the witness, Mrs. Matthews, began furnishing information about the gambling operation to Special Agent Smith of the FBI. Between that time and the trial in May 1972, Mrs. Matthews was interviewed on a score or more occasions, and the information was noted on the standard FBI interview report. The interview reports relating to her trial testimony consisted of almost 100 pages, all of which were furnished to the defense before the witness testified.

Two of those interviews were tape-recorded for the purpose of ensuring accuracy in the written reports to be prepared by the interviewing agent. The prosecutor, who was present at the time of the interviews, suggested to the agent that he use a tape recorder. The prosecutor testified (Pet. App. A112):

> I told Mr. Smith that because of the fact * * * that [the witness] was speaking so rapidly and providing so much information, and he was having difficulty in getting everything that was meaningful down, and he was somewhat frustrated, that the best way to go about getting everything that she had to say down was to use a tape recorder. I said to him, "Get a tape recorder and get it on tape, and when you have a chance, put it on a piece of paper as you usually do, and dispose of the tapes."

Following the interviews, Agent Smith took the tapes and his notes back to his office, where he reviewed the notes for accuracy by listening to the tapes. From the tapes and original notes, he then dictated detailed notes which were later transcribed on the interview reports that were ultimately furnished to defense counsel (Pet. App. A113). The tapes were then reused (Tr. 613). The interview reports for those two sessions were approximately 30 pages long.

The sole purpose of making the recordings was to ensure completeness and accuracy in the final interview report. They were used only by Agent Smith and only to compare with his interview notes prior to dictating the interview report, so that he could ascertain whether he had included all of Mrs. Matthews' information accurately in the report.

Although we believe the better procedure would have been for the FBI agent to preserve the tape recordings for examination by counsel, it was not error for the district court to refuse to strike the testimony of Mrs. Matthews. There was no evidence that the tapes were destroyed to prevent their examination by petitioners. The extensive reports that were compiled from the tapes were confirmed as accurate by the witness and were made available

to petitioners' counsel. In these circumstances, there was no need to strike the witness's trial testimony. See *Killian* v. *United States*, 368 U.S. 231, 242; *Rosenberg* v. *United States*, 360 U.S. 367, 371.

3. Petitioners also contend (Pet. 9-14) that the district court should have granted their pre-trial motion to dismiss the conspiracy count of the indictment, because under "Wharton's Rule" they could not properly be charged with a conspiracy to conduct an illegal gambling business involving five or more persons. "To charge the defendants with both the substantive crime and the conspiracy to commit the crime would be grossly improper for the substantive offense cannot in law or fact be committed without a conspiracy" (Pet. 10).

Wharton's Rule, which has been referred to but never applied by this Court, states that "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy" (*Gebardi* v. *United States*, 287 U.S. 112, 122). In our view, whatever validity Wharton's Rule may have in other contexts as a guide to legislative intent, it has no application in the case of Section 1955, particularly where, as here, the sentences for the substantive offense and the conspiracy are to run concurrently.

The application of Wharton's Rule in the context of 18 U.S.C. 1955 is at issue in *Iannelli* v. *United States*, No. 73-64, certiorari granted May 28, 1974, and the decision in that case may control the disposition of this case. We therefore believe that it would be appropriate to defer disposition of the present petition pending the decision in *Iannelli*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.